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No. 427 105

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

JACOB LICHTER AND JENNIE L. LICHTER, individually and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Jacob Lichter and Jennie L. Lichter, individually and as co-partners, doing business as Southern Fireproofing Company, a co-partnership, pray that a Writ of Certiorari issue to review an order entered March 10, 1947, by the United States Circuit Court of Appeals for the Sixth Circuit, affirming a judgment of the United States District Court for the Southern District of Ohio, Western Division, which order granted a judgment against the Petitioners, in favor

of the United States of America, for the sum of $27,019.39, with interest and costs.

SUMMARY STATEMENT

1. This case presents important questions relating to and involving the Renegotiation Act, which is contained in the following:

Sixth Supplemental National Defense Appropriation Act, 1942 (Act of April 28, 1942, Public Law 528, 77th Cong., 2nd Sess., 56 Stat. 226);

Revenue Act of 1942 (Act of October 21, 1942, Public Law 753, 77th Cong., 2nd Sess., 56 Stat. 298);

Military Appropriation Act, 1944 (Act of July 1, 1943, Public Law 108, 78th Cong., 2nd Sess., 57 Stat. 347); Act of July 14, 1943 (Public Law 149, 78th Cong., 1st Sess., 57 Stat. 569);

Revenue Act of 1943 (Act of February 25, 1944, Public Law 235, 78th Cong., 2nd Sess., 58 Stat. 21).

2. On October 20, 1944, Robert P. Patterson, then Under Secretary of War, issued a unilateral order determining that Petitioners had realized excessive profits of $70,000.00 during the calendar year 1942, and directed Petitioners to pay said amount to the Treasurer of the United States, less a tax credit of $42,980.61, or the sum of $27,019.39. Petitioners made no payment in response to this determination.

3. Thereupon this action was brought to recover the alleged excess profits in the amount of the determination.

4. The business of Petitioners is the construction of brick masonry, customarily by subcontracts, and is of a type which is generally similar to brick masonry as it has been known in the construction industry for many years (R. p. 26).

5. All contracts involved (R. p. 4) are subcontracts under prime contracts with a department of the Government, awarded as a result of competitive bidding for the construction of buildings and facilities (R. p. 26), and were obtained by Petitioners after further competitive bidding (R. p. 26).

6. Petitioners did not file a petition in the Tax Court of the United States for a redetermination of the Under Secretary's order, and the time for filing such petition has expired.

7. The District Court rendered judgment against Petitioners for $27,019.39, the amount of the determination.

PROCEEDINGS BELOW

The case came on for hearing in the District Court on the Government's Motion for Judgment on the Pleadings and for Summary Judgment (R. p. 23), and on Petitioners' Motion to Dismiss (R. p. 25).

The District Court filed no opinion, but entered a Findings of Fact and Conclusions of Law (R. p. 26), upon which judgment was entered (R. p. 31).

The Circuit Court of Appeals rendered and filed an opinion which is contained in the Record (R. p. 40).

JURISDICTION

Jurisdiction is conferred on this Court to review the cause by Writ of Certiorari, by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347).

QUESTIONS PRESENTED AND REASONS RELIED ON FOR WRIT OF CERTIORARI

I

Does the District Court have jurisdiction to determine the matters involved in the determination of the Secretary of War that Petitioners derived excessive profits for business done in the 1942 calendar year?

Both courts below answered this question "No," for the reason that a person aggrieved by a determination of excessive profits made after the effective date of the Revenue Act of 1943, *even with respect to 1942 business,* must seek relief only in the Tax Court of the United States (District Court Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. p. 44).

Petitioners contend that the Revenue Act of 1943 specifically reserved to Petitioners, *with respect to 1942 business,* a privilege to have all rights, claims and matters in connection with alleged excessive profits determined in the District Court, and that the adjudication of this Honorable Court, to wit, *Macauley v. Waterman S. S. Corporation,* 327 U. S. 540, is not in conflict with such contention.

II

If it be assumed that the District Court has jurisdiction to determine whether Petitioners' contracts are subject to renegotiation, does the Renegotiation Act exempt Petitioners' subcontracts?

The trial court found all facts necessary to sustain the claim that Petitioners' subcontracts are exempt from renegotiation as subcontracts under prime contracts with a department, awarded as a result of competitive bidding (R. p. 26), but nevertheless it held that the Tax Court of the United States only had jurisdiction, without regard to such uncontradicted facts which, under the Renegotiation Act, would specifically exempt such business (District Court

Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. pp. 43-44).

Petitioners contend that the trial court has jurisdiction, for the reason set forth in I above, and that the Renegotiation Act specifically exempts Petitioners' subcontracts as subcontracts under prime contracts with a department of the Government, awarded as the result of competitive bidding for the construction of buildings and facilities, by virtue of Section 403(i) (1) and Section 701(d) of the Act.

III

With respect to Petitioners' subcontracts and the determination that excessive profits were derived therefrom, is the Renegotiation Act, so applied, unconstitutional?

The courts below answered this question "No," for the following reasons:

That the Renegotiation Act is a proper exercise of the war powers of Congress; that the Act does not involve an unlawful delegation of legislative power to executive officials nor an exercise of judicial powers by such officials; that the Act does not involve an exercise of eminent domain; that Petitioners' property has not been taken for public use in violation of the constitution; that the Act is not so vague and uncertain as to offend the constitution; and that Petitioners are not and were not deprived of due process of law (District Court Conclusions of Law No. 2, R. p. 28; Circuit Court Opinion, R. pp. 44-46).

Petitioners contend that the Renegotiation Act is unconstitutional, for the following reasons:

1. That the Renegotiation Act violated standards required of legislation under the Constitution of the United States, for the reason that it is indefinite and uncertain in that there is no legal definition of the term "excessive profits."

2. That the legislative function residing in the Congress of the United States is improperly delegated.

3. That the determination constitutes a taking of Petitioners' property without due process of law, contrary to the Constitution of the United States.

4. That the determination constitutes a taking of Petitioners' property for public use without compensation.

Petitioners submit that this is peculiarly a case for the exercise of this Court's power of supervision and review for the following reasons:

1. The Renegotiation Act is important as war legislation, and continues to be important because cases and matters are still pending, not only in the administrative branches of the Government, but in the Tax Court of the United States, and in the United States District Courts and Circuit Courts. It is therefore of broad, general and public interest, and this Court should settle the several questions involved by reviewing the cause.

2. The courts below have held the Renegotiation Act constitutional. This holding is in conflict with:

Panama Refining Co. v. *Ryan*, 293 U. S. 388;
U. S. v. *Cohen Groc. Co.*, 255 U. S. 81;
Weeds v. *U. S.*, 255 U. S. 109;
Schechter Poultry Co. v. *U. S.*, 295 U. S. 495.

3. Serious constitutional questions are involved. In such instances a citizen should be entitled to a review by the highest court in the land.

4. Petitioners have been denied relief by reason of adjective questions alone. The law should strive to have matters of substance alone determinative of any denial of relief, particularly when the adversaries are Government and citizen.

SPECIFICATIONS OF ERROR

1. The District Court of the United States for the Southern District of Ohio, Western Division, erred in granting judgment against Petitioners.

2. The Circuit Court of Appeals for the Sixth Circuit erred in affirming the judgment of the District Court.

ARGUMENT

The argument and authorities relied upon follow.

WHEREFORE, Petitioners pray that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit in this cause.

Respectfully submitted,

PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
Attorney for Petitioners.

Dated May 15, 1947.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I am counsel for the Petitioners in the above entitled cause, and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact; and that said petition is not interposed for delay.

Dated at Cincinnati, Ohio, May 15, 1947.

PAUL W. STEER,
Attorney for Petitioners.

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

JACOB LICHTER AND JENNIE L. LICHTER, individually, and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

With Respect to Question Presented No. 1
(Petition, Page 4)

Under the Original Renegotiation Legislation, the Validity of Any Claim Made Thereunder Could Be Decided and Determined in the Several District Courts; the Revenue Act of 1943 (Act of February 25, 1944) First Inserted the Tax Court Provision; the Tax Court Provision Was Supplemental Rather Than in Abrogation of Pre-existing Remedies, and in Any Event the Tax Court Provision, for 1942 Business, Is Specifically Stated to Be Optional Only. The District Court Therefore Has Jurisdiction of the Entire Matter Herein and Petitioners Were Entitled to Raise All Defenses.

It will not be controverted that prior to the Revenue Act of 1943 (the Act of February 25, 1944), the rights of any person involved in renegotiation procedures was the same as in reference to other statutes: that the validity of any claim made thereunder could be decided in the time-honored way in a *judicial* proceeding. This is abundantly clear since the original draft of the *Sixth Supplemental National Defense Appropriation Act of 1942* (Act of April 28, 1942) contained a flagrantly improper provision that no suit or action could be maintained in any court to recover from the United States any amount withheld from the contractor pursuant to the renegotiation. This evolved considerable discussion, and when the bill finally emerged, the provision against relief in the courts was stricken; the discussions on the Senate floor are indicative of the reasons. *Indicative* only of the multiple references of the foregoing is the reply given by Senator McKellar, when questioned on this point. His reply is as follows (88 Cong. Rec., 3765):

> "... It will be remembered that when the amendment was originally before the Senate, the distinguished Senator from Connecticut, Mr. Danaher, called attention to the fact that *the bill contained a provision which would prohibit a contractor from going into the courts.* As a result of the amendment of the Senator from Connecticut, *that provision was stricken out.* When it was stricken out, the language was left in such shape that the Secretary could pass upon the question, and *if the contractor did not like the decision of the Secretary, he could go into Court and endeavor to have it overruled.*" (Italics ours.)
> "..."

Accordingly, until the *Revenue Act of 1943* (Act of February 25, 1944), a person aggrieved by any order of the Secretary had the right to have the validity and the pro-

priety of any action of the Secretary decided in the time-honored constitutional fashion in the courts.

Then, as has been stated, the *Revenue Act of 1943* was passed (Act of February 25, 1944), and the provision for an appeal to the Tax Court of the United States was inserted. *It is clear, however, that in reference to fiscal years prior to July 1, 1943—as in this case for 1942 business—the Tax Court proceedings are optional only, and Petitioners' remedy theretofore had, to have rights adjudicated in the District Court, was not taken away.*

The foregoing is demonstrated by a comparison of Section 403(e) (2) and Section 403(c). Section 403(e) (2) provides as follows:

> "(2) *Any* contractor or subcontractor (excluding a subcontractor described in subsection (a)(5)(B) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect *to a fiscal year ending before July 1, 1943,* as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may*, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may*, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties,

and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1) *except that* the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply." (Italics ours.)

In contrast to the *permissive* language of the foregoing, is the mandatory language of Section 403(c). Section 403 (c) is as follows:

". . . If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. *In the absence of the filing of a petition* with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. . . ."

Then, in Section 403(c) (6), the application of Subsection (c) are limited to amounts received or accrued (on contracts subject to renegotiation) for fiscal years ending *after* June 30, 1943. The following is the provision:

"This subsection shall be applicable to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any fiscal year ending *after* June 30, 1943. . . ."

Therefore, it is almost indisputably clear that the language "*in the absence of the filing of a petition with The Tax Court such order shall be final and conclusive,*" applies only to amounts received or accrued under renegotiable

contracts for fiscal years ending *after* June 30, 1943. The contracts here involved, and amounts received or accrued thereunder, involve only the fiscal year ending December 31, 1942, that is, in the language of the Act, a *fiscal* year ending *prior* to July 1, 1943; the language in this latter instance is permissive, *in contrast* to the mandatory language of the portion of the Act dealing with amounts received or accrued for fiscal years commencing after July 1, 1943.

Thus, by the plain terms of the statute, although Petitioners might have proceeded in The Tax Court with respect to the fiscal year here involved ending before July 1, 1943, after the Secretary's determination, they were not required to do so, and in no event were Petitioners subject to the language of Section 403(c) which states that "in the absence of the filing," etc., the decision of the Secretary will be final. In other words, a clear delineation is made between fiscal years ending *after* July 1, 1943, and fiscal years ending *prior* to July 1, 1943 [illegible]e legislature left contracts and contractors for fiscal [illegible]ears prior to July 1, 1943, in the same position as they had been prior to the Revenue Act of 1943, to wit: with a right of access to the courts.

The error in the Circuit Court's reasoning (R. p. 43) in considering this contention is patent. It comments that it is not unusual for the term "may" to be used, presenting to the citizen the option of either taking a further step in the litigious course, or submitting to the administrator's determination. The error is this: in the ordinary statutory setup the option or the alternative to the citizen is clearly, as the court says, seeking further review or submitting. The point here is—and entirely missed by the Circuit Court—that by virtue of the contrast between the permissive and the mandatory language of the two situations, the usual or ordinary alternative is not presented.

Here it is not an alternative of seeking review or submitting, but an alternative of seeking review either in the Tax Court or the District Court, on the one hand, or submitting, on the other hand.

Moreover, we submit, it is not incongruous, as the Circuit Court suggests (R. p. 43), that 1942 business should have this option when 1943 et seq. business should not, because, the Circuit Court says, 1942 business would then have the right of appeal, and 1943 business would not. There are two answers to this: (1) That Congress did not desire to take away from 1942 business what rights it already had, and (2) the provision in the Renegotiation Act that the Tax Court (an administrative body) should have exclusive jurisdiction *from which no appeal to the courts would lie*, is flagrantly unconstitutional and would be disregarded by the courts.

In conclusion, the jurisprudential policies and confines of decisions on jurisdictional questions should be examined. It is clear that Petitioners have a clear right to relief and exemption from renegotiation for 1942 business (Questions Presented No. II, Petition Page 4). To conclude that a citizen should be denied the right to set up and prove such on jurisdictional grounds is a conclusion which a court should come to with reluctance; to approach a jurisdictional question otherwise would make the courts a tryst for lawyers and not for the achievement of justice for the litigant. We submit that the Revenue Act of 1948 specifically reserves to Petitioners the right to have determinations under renegotiation heard and adjudicated in the time-honored fashion in the District Court; however, should we be in error in this respect, is it not indisputable that the language, and the structure of the legislation is, at best, ambiguous? The question then must be asked—should this Court not give the benefit of the doubt to Petitioners, and permit questions to be raised in the forum

chosen by the Government to collect what it considers its due from Petitioners? To deny Petitioners' right to set up defenses on ambiguous jurisdictional grounds, would be, we submit, doing an injustice not only to Petitioners, but to the administration of justice.

We are then brought to the consideration of *Macauley* v. *Waterman S. S. Corporation*, 327 U. S. 540, relied on by the Circuit Court. It is submitted that the case is not determinative of the instant issues for the following reasons:

(1) The question of the jurisdiction of the District Court was specifically left open in *Macauley* v. *Waterman S. S. Corporation* (supra). The Court there said:

> "Whether it [the District Court] can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. . . ."

Here the administrative process is at an end, and the matter comes to the District Court as the forum chosen by the Government to press its claim against the citizen.

(2) The issues are not merely "coverage" and exemptions as was the case in *Macauley* v. *Waterman S. S. Corporation* (supra). The Government does not contend that the courts may not determine the constitutionality of the legislation under which it acted, so admittedly the Tax Court remedy is not "exclusive" for all matters involved. It does contend, however, that the statute cannot be looked at by the Court *for any other reason* even to see if Petitioners are within its orbit or to see whether Petitioners here obeyed the mandate of the statute. The question therefore is not whether Petitioners exhausted their administrative remedies or whether the Tax Court has exclusive jurisdiction, but whether a court, which is asked to give judgment against the citizen in favor of his Government, and which examines the statute to see if it is con-

stitutional, may also look at it to see if Congress has said it should give judgment in this sort of case. The Court, the Government contends, may read the statute for the constitutional determination, but must close its eyes to everything else, even if it be assumed that the statute specifically directed Petitioners to follow the course they have followed, which we contend is the case. If the Court looks at the statute, may it not look at it for all purposes?

Whatever may be the law in this respect as a general proposition, the utter absurdity of it in this instance is evident when it is realized that the trial court found every fact necessary to sustain a ruling that Petitioners' contracts are exempt from renegotiation, and yet, it said, it could not adjudicate the issue completely, because it could not look further to determine whether the statute and the exemptions were in effect at a particular time. The following will demonstrate the foregoing:

The Court found (R. p. 26) the prime contracts involved were contracts with a department awarded as a result of competitive bidding for the construction of buildings and facilities, and that Petitioners' subcontracts were likewise the result of competitive bidding. Under Section 403(i)(1), therefore, Petitioners' subcontracts were exempt from renegotiation. Then the Court said: that is as far as we can go. We cannot look at the Act to see whether the exemption was available on a certain date. The Tax Court will have to do this.

The absurdity, to reiterate, is this: the Court could determine constitutionality and it could determine the facts which entitled Petitioners to exemption, but it could not determine and say whether the exemption part of the Act was effective on a certain date so as to govern Petitioners' subcontracts.

We feel, therefore, that *Macauley* v. *Waterman S. S. Corporation* (supra) is inapplicable.

(3) If we have correctly read the statute (pages 11 and 12 hereof), it specifically says that Petitioners have the right to go to a court for 1942 business. Should they be compelled to go to the administrative level to have it decide that the statute says they didn't have to go to the administrative level, but instead, had the option of going to a court? If the statute says that Petitioners may go to a court, why may they not go and do as the statute directs? It is not a question of coverage, exemption, or exclusive jurisdiction of the Tax Court. The question is whether Petitioners have followed a statutory direction as to procedure. We submit that the Court may look at the statute to see if they have, and if they have, to so find. We submit further that Petitioners have precisely conformed to the statute, and if the Court had not been erroneously restrained by *Macauley* v. *Waterman S. S. Corporation* (supra), it would have so found. In any event this question was not decided in *Macauley* v. *Waterman S. S. Corporation* (supra) and is not a bar to the Court reviewing Petitioners' contentions.

With Respect to Question Presented No. II

(Petition, Page 4)

If It Be Assumed That the District Court Has Jurisdiction of This Cause for the Reason Set Forth Hereinabove, We Contend That Petitioners' Contracts Are Exempt under the Revenue Act of 1943 (Act of February 25, 1944), as Competitive Subcontracts under a Contract with a Department of the Government, Awarded as a Result of Competitive Bidding for the Construction of Buildings and Facilities.

Actually the contracts herein were doubly competitive since they were entered into after competitive bidding on the part of the prime contractors and further competitive bidding on the part of defendants and other masonry con-

tractors. This is admitted by virtue of the Government's Motions and the trial court so found (Findings of Fact, R. p. 26).

The original Renegotiation Act (April 28, 1942) purported to blunderbus all contracts involving more in principal amount than $100,000.00. Later, on the first amendment to the Act, October 21, 1942, certain contracts and subcontracts were made exempt and the Secretary was given permission to exempt certain others *as of and related back to April 28, 1942.* Then, in the *Revenue Act of 1943*, passed February 25, 1944, competitive construction contracts and subcontracts with the Department *were made exempt; and here again, as to subcontracts, the exemption related back as if it "had been a part of Section 403 on the date of its enactment"* on April 28, 1942. The 1943-44 Act provides as follows:

> "*Section 403(i) (1).* The provision of this section shall not apply to—
>
> (E) Any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or
>
> (F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."
>
> "*Section 701(d)—Effective Date*
>
> The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), *(i) (1) (F)*, (i) (3), and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment*, and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Italics ours.)

The foregoing provide that subcontracts under prime contracts with a Department of the Government awarded as a result of competitive bidding for the construction of buildings and facilities, are exempt from all provisions of the Renegotiation Act, retroactive to April 28, 1942.

In the mention of the matter in the Court below by Government's counsel, it is indicated that because Section 403(i) (1) (E) relates back only to July 1, 1943, then Section 403(i) (1) (F) is related back only to that date. This contention is maintained by the Government despite the clear and succinct language of the "effective date" provision, Section 701(d), which provides that Section 403 (i) (1) (F) "shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment" (April 28, 1942). Congress here clearly desired subcontracts to be exempt, back to April 28, 1942, and prime contracts to be exempt only from July 1, 1943. This is indisputably shown by the Senate Report on the Revenue Bill of 1943 (Report No. 627; 78th Cong.; 1st Sess.); the House Report (Report No. 871; 78th Cong., 1st Sess.); and the Conference Report in the House of Representatives (Report No. 1079; 78th Cong., 1st Sess.). The Senate Report (Report No. 627) states as follows (page 100):

> "3. *SUBCONTRACTS* UNDER EXEMPT CONTRACTS OR *SUBCONTRACTS* [Subsec. (i) (1) (I) of the Finance Committee Bill; (i) (1) (E) of the House Bill].
>
> "Under existing law, considerable confusion results from the fact that a *subcontract* may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The House Bill exempted such contracts as were directly or indirectly under an exempt contract or subcontract.*

"The exemption in the House Bill went to contracts and subcontracts exempted from the provisions of the renegotiation section and to those to which that section was inapplicable by reason of paragraph (1) of subsection (i). Under the committee bill, the exemption is restricted to contracts and subcontracts to which the renegotiation section is made inapplicable by the paragraph.

"*There is an important difference between the House and the committee bill in this respect, further, in that the committee bill makes the exemption retroactive to April 28, 1942.* The House exemption applied only to amounts received or accrued under such contracts or subcontracts in fiscal years of the contractor or subcontractor ending after June 30, 1943." (Italics ours.)

It is important to note that the foregoing relates to or deals with subcontracts only. Observe the heading itself: "*Subcontracts* Under Exempt Contracts or *Subcontracts.*" The prime contract exemption is taken up separately at another place in the Report (Report No. 627, p. 103). The difference between the House and the Senate bills are shown positively to be: (a) the House bill proposes to exempt only subcontracts under exempt prime contracts and subcontracts, but related both back to April 28, 1942. The House Report (Report No. 871) states this, as follows (page 79):

"3. SUBCONTRACTS UNDER EXEMPT PRIME CONTRACTS OR SUBCONTRACTS.

"Under existing law, considerable confusion results from the fact that a subcontract may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The bill exempt such subcontracts as are directly or indirectly under an exempt contract or subcontract.*" (Italics ours.)

Thus, the House bill proposed to exempt only subcontracts under prime contracts which were exempt. The House bill further made both prime contracts and subcontracts exempt from July 1, 1943. The Senate bill treated the two separately and related the subcontracts back to April 28, 1942.

The fact that separate treatment was given to subcontracts on the one hand and prime contracts on the other, is a flat denial that Section 403(i) (1) (F) may only apply if the prime contract was itself exempt as of April 28, 1942. To make the exemption of the prime contract a condition precedent to the exemption of a subcontract is impossible once the two are treated separately.

The only inquiry remaining is to ascertain how the difference in the two bills was resolved. A summary of House and Senate actions follows:

The Conference Report of the House (Report No. 1079, page 36) first took up the competitive construction contract general exemption which had not been contained in the House bill at all; the House agreed to the Senate amendment, thus agreeing that the present Section 403(i) (1) (E) should be in the final bill. This Conference Report in this respect is as follows:

> "*Amendment Numbered 295:* That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: on page 96, line 17, of the Senate Engrossed Amendments, strike out '(F)' and insert (E); and the Senate agree to the same."

This put the general competitive contract in the bill. Amendment No. 296 renumbered the subcontract exemption [403(i) (1) (F)] and inserted it in the final bill. Then came Amendment Numbered 297. What was accomplished by Amendment No. 297 is explained in the "Statement of the Managers [of the Conference] on the Part of the House" (Report No. 1079, p. 85), as follows:

"*Amendment Numbered 297:* Under the provisions of subsection (i) (1) (G) of the Renegotiation Act, as amended by the House bill, any subcontract directly or indirectly under a contract or subcontract exempted from the provisions of the act, or to which the act does not apply by reason of subsection (i) (1) thereof, is exempt; this amendment limits the exemption of such subcontracts under subsection (i) (1) (G) to those which are directly or indirectly under contracts or subcontracts to which the Renegotiation Act does not apply by reason of subsection (i) (1). *The House recedes.*"

Thus, the House bill's proposal that only subcontracts under exempt contracts was receded from, and the Senate's separate treatment of subcontracts adopted. This pointedly refutes the Government's treatment of this phase.

Finally, Amendment No. 309 of the Conference Report shows that the House receded and agreed to the Senate's proposals, namely, that the exemption of competitive subcontracts only under section (i) (1) (F) relates back to April 28, 1942, even though the prime contracts therefor under Section (i) (1) (E) are exempt from July 1, 1943. In the "Statement of the Managers (of the Conference) on the Part of the House" (Report No. 1079), this is clear. On page 88 the effective date provision is discussed. The Managers state:

"*Amendment No. 309:* This amendment relates to the effective dates of various provisions. *The House recedes* with amendments."

Hence the House agreed to relate the exemption for competitive subcontracts for the construction of a building or facility back to April 28, 1942, as contained in the Senate proposal.

It may be presumed that one of the compelling reasons for the House recession on the separate consideration for

subcontracts was the direct result of testimony before the Senate Committee by Joseph M. Dodge, of the Joint Price Adjustment Board. The Joint Price Adjustment Board was the top administrative agency charged with overseeing all renegotiation. Mr. Dodge was Chairman of the Board. Mr. Dodge testified on Monday, December 6, 1943, and his testimony is contained in the Committee Hearings (Committee on Finance) at pages 1074-5 ("Revenue Act of 1943, Hearings, before the Committee on Finance, U. S. Senate; 78th Cong., 1st Sess.," Government Printing Office). There he details his suggestions for changes in the Renegotiation Act. As we interpret Mr. Dodge's language he there makes the specific suggestion, in reference to the exemption, to this effect: that, although there were certain prime contracts which he felt undesirable to exempt from the renegotiation, the subcontracts under those prime contracts should be exempt from an earlier date than the prime contracts themselves. The following is his suggestion:

> "F. Retroactive application of new exemptions and related provisions: It is suggested that the exemptions of *charitable contracts*—subsection (i) (1) (D), page 125, line 25—and of *subcontracts* under exempt prime contracts—subsection (i) (1) E), page 126, line 3, and the provision for special cost allowance at the exemption line in the case of exempted products used by integrated companies—subsection (i) (3)—should be added to the list of provisions of the act which are made effective as though they had been made a part of section 403, on the date of its enactment, April 28, 1942. (See subsection (d) effective date, page 130, line 7.)"

It should especially be noted that the "subsection (i) (1) (E)" referred to by Mr. Dodge is the "(E)" section of the House bill and not the "(E)" section of the present law. The House bill "(E)" related to subcontracts only and

became the "(F)" section of the present law. The Conference Report states:

> "*Amendment Numbered 295:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: "On page 96, line 17, of the Senate Engrossed Amendments, strike out '(F)' and insert (E); and the Senate agree to the same."
>
> "*Amendment Numbered 296:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 296, and agree to the same with an amendment as follows:
>
> "In lieu of the matter proposed to be inserted by the Senate amendment insert (F); and the Senate agree to the same."

The managers state as follows:

> "*Amendment No. 295:*
>
> "This amendment exempts from the provisions of the Renegotiation Act any contract awarded as a result of competitive bidding for the construction of any building, structure, improvement, or facility. The House recedes with a clerical amendment, relettering the sub-paragraph."
>
> "*Amendment No. 296:*
>
> "This is a clerical amendment. The House recedes with a clerical amendment relettering the sub-paragraph."

Therefore, we submit that the contracts upon which suit has been brought are exempt from all renegotiation, and because the District Court did have jurisdiction to hear the matter, Petitioners' Motion to Dismiss should have been granted.

With Respect to Question Presented No. III
(Petition, Page 5)

(1) The Renegotiation Act Violates Standards Required of Legislation Under the Constitution of the United States, for the Reason That It Is Indefinite and Uncertain in That There Is No Legal Definition of the Term "Excessive Profits."

In the enactment of April 28, 1942 (Petition, p. 1 hereof), no definition of "excessive profits" is set forth. Renegotiation was permitted whenever in the "opinion" of the Secretary "excessive profits" had been realized. In the amendment of October 21, 1942 [Section 403(4)], the term "excessive profits" was defined as "excessive profits"!

In the Act of February 25, 1944 [Section 413(a) (4) (A)], certain factors were set forth which were to be taken into consideration in any determination of excessive profits. This was an attempt to put some content into the term.

We submit, however, that the amendment of February 25, 1944, should not govern the instant case. It is 1942 business which is here involved, and the determination was not made until 1944. Should not 1942 business be governed by legislation then existing? Too, if the statute is given substance by administrative practice, which the Government contends, it is evident that the War Contract Price Adjustment Board (set up only in the later Act) was of the opinion that the 1942 Act governed 1942 business. For instance, a publication of the War Control Price Adjustment Board was issued for the "guidance of war contractors, their attorneys and accountants," and is headed "Renegotiation Act of 1942 Applicable to Fiscal Years Before July 1, 1943"; and again "Renegotiation Act of 1943 Applicable to Fiscal Years Ending After June 30, 1943." We believe it was not until these matters got into the courts,

and it was found that the 1942 Act contained no definition of excessive profits whatsoever, that the contention arose that the 1943 Act should govern 1942 business. We submit that it is neither legally proper nor fair play for the Government to contend that 1943 legislation should govern 1942 business. It is retroactivity plus. If there had been no 1942 legislation, it would be somewhat different, but there being legislation, should not the citizen be entitled to rely on the fact that it is there, and that he is covered only within the confines of it?

These factors of the Act of February 25, 1943, however, better the situation very little even if applied to the 1942 business here involved. In the first instance, those named factors may be taken into consideration, but *there is no exclusion of other factors* that may be considered. Thus, in the order of October 20, Exhibit A to plaintiff's complaint, the broad scope of the factors considered is indicated. Certain data submitted by the contractor and other information obtained by the Secretary from Governmental or "other reliable sources" (unknown to Petitioners) were used. Further, factor vii itself states that such other factors, the consideration of which the public interest and fair and equitable dealings may require, may be considered. This in itself opens the door for completely unrestrained and unfettered considerations by the Secretaries involved, and may indeed be changed from day to day or from hour to hour, consistent with, say, changes of the personnel of the Board, or any changes consistent with the temper of the Board from time to time. No greater vice is known to the law than evidence dehors the record and secret data.

Ohio Bell Telephone Co. v. *Public Utilities Commn. of Ohio*, 301 U. S. 292;
Morgan v. *U. S.*, 298 U. S. 468 and 304 U. S. 1.

In the *Ohio Bell* case the Court condemned procedures such as these in the following language:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. *The Commission, withholding from the record the evidential facts that it has gathered here and there, contends itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms.*"

And then, considering the factors separately, it will be noted that the emphasis in (i) is efficiency, (ii) reasonableness of costs and profits, and in (iii) amount and source of capital, and in (iv) risk assumed, (v) extent of contribution to the war effort, and (vi) complexity of business, and (vii) such other factors as might come to the mind of the administrator. Who is to say what is efficiency? Who is to say what is a reasonable cost and a reasonable profit? For instance, does increased volume warrant greater profits; and if so, how much? What is the yardstick to be used? Does the peacetime product warrant a greater profit than the wartime product? Or

supposing the contractor is still making the peacetime product, is he entitled to one profit on his peacetime product and still another profit on his wartime product? Who is to say that a manufacturer who uses private capital deserves a higher profit in dollars and percentages than a contractor who is working on public capital? And if so, how much? Who is to say what is the risk assumed in any business? Is it measured by volume of sales, net worth, or dollar amount of risk, or the Secretary's opinion? Who is to say as to the nature and extent of the contribution of the war effort? Does it mean that a plant or an organization that did not work the clock around was not making the proper contribution? What is inventive talent? Who is to determine the complexity of a manufacturing technique? And what credit can be given for this? A machine is tooled within 2/15000 of an inch. Is this to be given greater credit than laying to the line by Petitioners' masons? Who is to say what are the other factors which the Board may consider from time to time, that will place a halo over the contractor's head or hang a lawsuit around his neck?

Do not these conditions alone of the Act of February 25, 1944, show that despite the attempt to improve, Constitutional legislative standards are not met. The standards are vague, inefficient and unpredictable. The administrative actions thereunder are unpredictable. It is not possible to determine whether or not the will of Congress has been met by the administrators. Congress had not set a basic condition of fact upon whose existence or occurrence it directs that its statutory command shall be effective—neither Congress, nor the public, nor the courts, nor the contractor, no one but the administrator at the moment of the rendition of his decision, knows whether or not any particular contractor has produced an unconscionable profit or a sanctified gain.

The definition of the term "excessive profits" is the keystone of the arch on which the statute rests. If there is no definition which is definite and certain, as there is not, it follows that the statute itself must fall. Vagueness, uncertain terms and indefiniteness are legislative sins which the courts do not condone but correct by striking down the legislation.

U. S. v. *L. Cohen Grocery Co.*, 255 U. S. 81;
Weeds v. *U. S.*, 255 U. S. 109;
Small Co. v. *American Sugar Co.*, 267 U. S. 233;
Schechter Poultry Co. v. *U. S.*, 295 U. S. 495;
Panama Refining Co. v. *Ryan*, 293 U. S. 388.

(2) The Legislative Function Residing in the Congress of the United States Is Improperly Delegated in the Renegotiation Act.

The essentials of a proper delegation of legislative authority has been variably expressed. In the *Yakus* case (321 U. S. 414) the Court said (pp. 424-5):

> ". . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by designated administrative agency, it directs that its statutory command shall be effective. . . ."

In the *Schechter* case (205 U. S. 495, 541) the Court said:

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. . . ."

In *Panama Refining Co.* v. *Ryan* (293 U. S. 388, 415) the Court said:

". . . Accordingly, we look to the statute to see whether the Congress has declared a policy . . . whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President. . . . So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition."

A careful study of all the cases causes the irresistible conclusion that in determining whether or not any particular legislative act is bottomed upon Constitutional legislative standards and confined within Constitutional boundaries to assure predictable administrative action—that is, not vague, not unreasonable, not inefficient, not unpredictable, etc.—three basic conditions must exist:

(a) The Act must contain a definite statement of policy or purpose.

(b) Congress itself must prescribe definite standards for the administrative guidance.

(c) The Act must prescribe methods to be followed in its administration and execution, by which not only Congress but the courts and the public can determine whether the agency has kept within the limits so prescribed by Congress.

The question then is, do these basic conditions exist with respect to the Renegotiation Act? We submit that none of these basic conditions does exist.

As to whether there is a definite statement of policy or purpose.

One will search in vain for a statement of policy or purpose. The Act refers to excessive profits—there may indeed be evils flowing from them—but the Act does not contain a statement of policy or purpose to give body and control to the term nor to guide the administrator. Little

more need be said in this respect. If, in fact and law, there must exist a statement of policy or purpose, as we contend, it does not exist in the Renegotiation Act.

Panama Refining Co. v. *Ryan* (supra).

As to definite standards for administrative guidance and procedure to permit the Congress, the courts and the public to ascertain whether the administrator is within the limits of the legislation.

The keystone of the Act is the determination of "excessive profits." We have shown that as to the earlier legislation no definition at all existed and that as to the 1943 Act the definition attempted is indefinite and uncertain. How then may the Congress and the courts—and the public—determine whether the administrative agency has kept within the limits prescribed by Congress?

(3) The Determination That Petitioners Realized Excessive Profits and the Judgment Based Thereon Constitutes a Taking of Petitioners' Property Without Due Process of Law and a Taking of Petitioners' Property for Public Use Without Compensation.

The crux of this issue is whether the determination of the Secretary of War ordering Petitioners to pay money into the United States Treasury is a taking of property for public use without compensation and without due process of law. Petitioners submit that any order in renegotiation does constitute a taking of property, and a taking for public use without compensation in violation of the Constitution of the United States. The Government contends that a Renegotiation Order is not a taking of property, but a recapture of profits, or a retaking of part of the purchase price paid. It is difficult indeed to conceive that the contention that a recapture is not a taking is seriously made. The usufruct of the contract is the consideration

for it. To modify it, whether by way of retaking part of the consideration or recapturing part of the profits taken on it, is one and the same thing. Petitioners submit that this approach under the Renegotiation Act, and the operation of the Act as to Petitioners, constitutes a disingenuous device to take property under the guise of recapture of profits if the person or contractor involved made more on the contract than in the opinion of the Government administrative agent he should have made. *This is not fair play.*

Nor indeed was it necessary, although the Government in the courts below went on at length to prove its necessity to the procurement process. In any event necessity does not beget constitutionality. Any doubt as to its necessity should be put to rest by evidence of recent date. Secretary of War Patterson wrote just a few months ago to Representative Case in connection with renegotiation, and the fact is that the bulk of the so-called excessive profits would have been returned to the Government in any event. And it would have been returned in the ordinary ways and with uniformity and fairness, and not simply when in someone's mere opinion it should be done. That letter dated November 23, 1946, is as follows:

"WAR DEPARTMENT
WASHINGTON

November 23, 1946

"Hon. Francis Case
House of Representatives
Washington, D. C.

Dear Mr. Case:

Renegotiation of Contracts.

You will be interested, I am sure, to learn that refunds in contract renegotiation, as of November 15,

1946, have reached $10,007,381,000. That is slightly over $10 billion. Of this total the War Department figure is $6,717,474,000.

It is estimated that federal income and excess profits taxes would have recovered 70 percent of these figures, without renegotiation. Even with this factor, however, the net recovery is $3 billions.

The expenses incurred in renegotiation, through December 31, 1945, were $29,772,000, of which figure the War Department expense was $22,581,000. This represents about ⅓ of 1 percent of the total recoveries.

The savings to the government were, of course, far greater than are revealed by the figures. This is due to the fact that the presence of renegotiation influenced many contractors to reduce their prices in forward contracts.

I am enclosing a set of tables relative to renegotiation that I am sure you will be interested in.

With best regards, I am

Sincerely yours

/s/ Robert P. Patterson
Secretary of War''

rpp:lm
Encl

Petitioners submit, therefore, that beyond peradventure of a doubt there has been a taking of Petitioners' property. The taking, however, may be lawful, in the exercise of the taxing power, if it could be found to operate uniformly, which, of course, it does not. The Government, however, has always stoutly and vigorously opposed the view that the Renegotiation Act was taxing legislation, as the infirmities are so clear if so viewed.

We reiterate, therefore, that there is a taking of Petitioners' property, and if the legislation is not tax legislation, there remains but one other inquiry, to wit, does the war emergency permit a disregard of the constitution so that legislation otherwise bad, is validated.

The opinions and rulings of this Court are clear that the constitution is as living and vibrant in times of war as in times of peace.

"War" legislation transcending constitutional boundaries in the First World War was stricken down. In *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 88, in its opinion the Court said:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

Perhaps a more pertinent explanation is contained in *United States* v. *Schechter Poultry Co.*, 295 U. S. 495, 528. In this case it was urged that the national critis demanded a broad and extensive co-operative effort by those engaged in trade and industry, and in the event co-operative effort as seen from the executive viewpoint was not forthcoming, coercive exercise of Governmental power was called for. The Court said (p. 528):

> ". . . we are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. *Extraordinary conditions do not create or enlarge constitutional power.* The Constitution established a national government with powers deemed to be adequate, as they had proved to

be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. . . ."

In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425, the doctrine is again stated:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

Historically, these cases are bottomed upon firm judicial precedent, for, in *Ex Parte Milligan*, 4 Wall. 2, 120, the Court said:

". . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

The foregoing is not to deny that the war power of the Government is the power to wage war successfully. It is not restricted to the repulse of the enemy forces in the field. To wage war successfully every phase of the national life must be encompassed. It is not to say, either, that the Government should not insist that the forces of trade and industry be in full production for the benefit of the war effort. What the power to wage war successfully does not approve, however, is indiscriminate, arbitrary and capricious taking of property for public use, with insufficient standards to guide the administrative personnel, and without the uniformity, geographically or otherwise, to sustain the legislative act as a taxing measure. It should also be abundantly clear that neither the morale of the troops nor that of the Nation would have been adversely affected if the statute had been framed so that it would operate surely and uniformly and without discrimination as between persons similarly situated.

Finally, no excess profits are contained in Petitioners' contracts. This was found "beyond a reasonable doubt," we submit, by the courts below. Petitioners' contracts were each and all for brick masonry, similar to brick masonry as known in the construction industry for many years (Findings of Fact No. 2, R. p. 26). The costs, percentages of profit and contract prices of such contracts are ascertained, calculated and realized in a manner generally known to all Departments of Government and to the construction industry for many years, and the contracts were entered into upon competitive bidding on the part of the principal contractors, and further competitive bidding on the part of defendants and other masonry subcontractors (Statement of Fact No. 2, R. p. 26). Hence the prices of the contracts as let were the fair and reasonable market prices because they were determined in the manner in which time

and experience have shown to be the best means for determining such prices.

The contract, therefore, could not and did not contain excessive profits.

Petitioners accordingly urge this Honorable Court to issue its writ to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Attorney for Petitioners.

Dated May 15, 1947.